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# The Idea of the Casebook: Pedagogy, Prestige, and Trusty Platforms

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THE IDEA OF THE CASEBOOK: PEDAGOGY,  
PRESTIGE, AND TRUSTY PLATFORMS<sup>†</sup>

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ABSTRACT

*Independently published, electronically delivered books have been the future of the law school casebook for some time now. Are they destined to remain so? We sketch an e-casebook typology then highlight some features of law professor culture which suggest that, although e-casebook offerings will surely expand, the trust credential that the traditional publishers provide plays a durable, central role in the market for course materials that law professors create.*

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<sup>†</sup> With a tip of the hat to Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901 (2006).

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## INTRODUCTION

In 2015, it is easier than it has ever been for a casebook author to produce and to distribute that casebook electronically *and* independently, without the aid of one of the large, traditional publishers (Aspen, Carolina Academic Press, Foundation-West, Lexis-Nexis). More authors are doing so now than were a decade ago. But it is still a niche phenomenon, given the thousands of courses offered at hundreds of law schools every year. Have conventional casebooks proved to be—as one might have thought possible, even likely, more than a decade ago—“toast”?<sup>1</sup> Decidedly not.

Why, then, has the independently produced, web-delivered casebook failed to sweep the field? After all, many production and distribution costs have fallen quite dramatically. Consider, on the input side: sites such as Google Scholar make vast bodies of federal and state caselaw electronically available, and readily findable, outside the cloak of an end-user license agreement that could inhibit re-use of the case text to make one’s own book,<sup>2</sup> while other public-domain federally authored materials<sup>3</sup> are

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<sup>1</sup> Robert Laurence, *Casebooks Are Toast*, 26 SEATTLE U. L. REV. 1, 1 (2002).

<sup>2</sup> Google Scholar’s “terms of use” are those of Google more generally, available at <https://www.google.com/intl/en/policies/terms>.

<sup>3</sup> The Copyright Act has, at least since 1976, mandated this public-domain status. See 17 U.S.C. § 105 (2012) (“Copyright protection under this title is not available for any work of the United States Government . . .”). The predecessor provision was to similar effect. 35 U.S.C. § 8 (1970) (“No copyright shall subsist . . . in any publication of the United States Government, or any reprint, in whole or in part thereof[.]”). The public-domain status of federal decisional law

abundant on agency websites. Consider, on the production side: software for editing cases, writing critical interstitial matter (such as Notes & Questions), collaborating with co-authors (using web services such as DropBox or Google Drive), and producing standard formats (PDF, epub, etc.) is cheap and abundant; the web is an easily accessible distribution platform, whether one uses a third-party site or creates one's own; and web-based payment systems, whether generalized (such as PayPal) or purposes-built for publishing (such as Gumroad), enable one to charge for the book. For die-hard fans of the paper book, print-on-demand outlets (such as Lulu) are available too. Users can download even quite large files to the tablets, laptops, or e-book readers they surely possess, over a high-speed law school network if not broadband they have at home, and open the files with standard-compliant software (*e.g.*, a PDF reader) that they already have or can easily get. Set against the world of 1995, or even that of 2005, the world of 2015 poses markedly lower entry barriers to the indie e-casebook. And there are many more such casebooks now than there were then. We know this firsthand, as both the co-authors of an e-casebook first published in 2008 and the co-founders/co-owners of the company, Semaphore Press, that publishes it.<sup>4</sup>

One can fairly wonder, however, why there aren't *even more* indie e-casebooks. Why isn't there an iTunes of casebooks? A Spotify or Pandora of casebooks? Why, in short, hasn't there been an obvious break-out success among new e-casebook publishers? We have asked ourselves some version of that question more than once since 2008. Perhaps some costs of independence are higher, or more durable, than one might have supposed. Perhaps some benefits of independence are smaller, or more fleeting. To highlight other costs and benefits, one must widen one's view to include some rewards and risks endemic to law-professor culture. We do so in this essay.

But before we situate the indie e-casebook in the law professor's economy of prestige, we offer a casebook typology

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was settled almost two centuries ago, in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834).

<sup>4</sup> See generally Lydia Pallas Loren, *The Viability of the \$30 (or Less) Casebook*, 22 J. INTELL. PROP. L. 71 (2015).

broad enough to include independently published e-casebooks. The typology not only organizes the varied casebooks law professors now encounter, it also dispels the misperception—common, in our experience—that one can fairly label *all* independent e-casebooks “open source” or “open access.” That assumption is mistaken.

## I. THE CASEBOOK TERRAIN

One can sort casebooks into basic types using three contrasts. The contrasts are the degree to which the book is provided exclusively in print, exclusively electronically, or on a mixed basis; the degree to which the book is provided either for a fee, free of charge (beyond the means needed to obtain the book in the first instance), or on a mixed basis; and the degree to which the book’s accompanying copyright license, if any, affords the end-user greater freedom to remix the book’s content than the fair-use baseline provides.<sup>5</sup>

*Print v. Electronic.* The traditional casebook publishers began as print-only operations. By contrast, some authors of e-casebooks offer them exclusively electronically, leaving it to the user to decide how much, if any, of the book to print for oneself. For example, Professor Barton Beebe has published *Trademark Law: An Open-Source Casebook* on a purpose-built website.<sup>6</sup> The H2O casebook project,<sup>7</sup> based in Harvard University’s Berkman Center for Internet & Society, is a web-native platform. Professor Herbert Hovenkamp has published *Innovation & Competition Policy: Cases & Materials* as a series of interlinked manuscripts on the Social Science Research Network (“SSRN”),<sup>8</sup> perhaps more

<sup>5</sup> See 17 U.S.C. § 107 (2012) (codifying the fair use defense).

<sup>6</sup> Barton Bebe, *Trademark Law: An Open-Source Casebook*, <http://tmcasbook.org> (last visited May 20, 2015).

<sup>7</sup> H2O, BERKMAN CENTER INTERNET & SOCIETY, <http://cyber.law.harvard.edu/node/1112> (last visited May 20, 2015).

<sup>8</sup> The opening chapter, which also contains links to all the other chapters and thus organizes the book, is available at <http://ssrn.com/abstract=1936964>. Much like Professor Hovenkamp, one of us distributes a collection of edited patent cases and related materials through SSRN for use as a casebook when paired with a traditional softcover hornbook. Joseph Scott Miller, *Patent Law: Cases & Materials, Version 1.4* (Dec. 11, 2014) (for use with Janice M. Mueller,

familiar as a repository for working papers not yet in finally published form. None of these casebooks, so far as we can tell, uses digital rights management (“DRM”) to limit users’ capabilities.

Some indie e-casebooks take a mixed approach. For example, Semaphore Press publishes its titles principally as DRM-free PDFs, but it also makes one of its titles available on a print-on-demand basis through Amazon.com.<sup>9</sup> The e-Langdell casebook project, hosted by CALI, also offers both DRM-free e-books and print-on-demand versions.<sup>10</sup> Similarly, as they describe elsewhere in this volume, Goldman & Tushnet publish their casebook, *Advertising & Marketing Law: Cases & Materials*, in both electronic and print forms,<sup>11</sup> as do Boyle & Jenkins with their casebook, *Intellectual Property: Law & the Information Society*.<sup>12</sup> The traditional publishers, for their part, have also made moves toward offering electronic versions of, or complements to, their print books. By sharp contrast to the indies, however, the traditionals heavily encumber these electronic products with DRM, limits on printing, and other restrictions.<sup>13</sup>

*Fee v. Free.* The traditional casebook publishers distribute their titles to students strictly on a fee-for-book basis, whatever campus bookstore or other retailer (e.g., Amazon.com, Powells.com) might stand in the middle and regardless of whether the format is print or electronic. At least one independent publisher (Goldman & Tushnet) takes the same approach, i.e., the book can be obtained

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*Patent Law* (4th ed. 2012)), available at <http://ssrn.com/abstract=2408843>.

<sup>9</sup> See *About Semaphore Press*, SEMAPHORE PRESS, <http://www.semaphorepress.com/about.html> (describing Semaphore Press) (last visited July 6, 2015); JAMES GRIMMELMANN, *INTERNET LAW: CASES & PROBLEMS*, [http://www.amazon.com/Internet-Law-Problems-James-Grimmelmanna/dp/1943689008/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1440966046&sr=1-1](http://www.amazon.com/Internet-Law-Problems-James-Grimmelmanna/dp/1943689008/ref=sr_1_1?s=books&ie=UTF8&qid=1440966046&sr=1-1) (offering a print book on demand).

<sup>10</sup> *About eLangdell*, CALI, <http://www.cali.org/elangdell/about> (last visited May 20, 2015).

<sup>11</sup> Eric Goldman & Rebecca Tushnet, *Self-Publishing an Electronic Casebook Benefited Our Readers—And Us*, 11 WASH. J.L. TECH. & ARTS 49 (2015).

<sup>12</sup> JAMES BOYLE & JENNIFER JENKINS, *INTELLECTUAL PROPERTY: LAW & THE INFORMATION SOCIETY* (2014).

<sup>13</sup> See Loren, *supra* note 4, at 80-83 (describing some of these offerings).

only in exchange for a fee.<sup>14</sup> Other indies sit at the opposite pole, offering the electronic forms of their casebooks at no cost (beyond that of retrieving and storing it). The Beebe, Hovenkamp, and H2O project titles occupy this position. Others take a mixed approach. Both the eLangdell titles and the Boyle & Jenkins IP law book shift from free to fee when the book shifts from e- to print.

Semaphore Press, for its part, is unique in casebook pricing. From its launch in 2008 to now, it has used the same approach for all of its titles: for the e-books, which are DRM-free PDFs, we suggest a price of \$30 (which works out to about \$1 per class session at the typical law school), but the student chooses the price s/he wants to pay. That price can be as low as \$0, if the student opts for that, because every Semaphore Press author agrees to one overriding principle—no matter what, even if s/he can't or won't pay, *the student always gets the book*. (This is all fully explained at the Semaphore Press website.<sup>15</sup>) Interestingly, our experience over the last seven years is that about 80% of students pay something, and, of those who pay, about 85% pay \$30.<sup>16</sup> The print-on-demand books, which Semaphore Press began to offer only recently, do require payment and are priced to cover the cost of printing and delivery plus \$30 for Semaphore Press.<sup>17</sup>

*All Rights Reserved v. Broad User License*. The traditional casebook publishers include copyright notices in the front matter stating that the publisher reserves all its copyright-law rights, thereby maximizing the protection that copyright law affords the copyright owner. For example, the back of the title page of *Telecommunications Law & Policy* (4th ed.), by Professors Stuart Minor Benjamin and James B. Speta, states as follows:

Copyright © 2015  
Carolina Academic Press  
All Rights Reserved

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<sup>14</sup> Goldman & Tushnet, *supra* note 11, at 51-52.

<sup>15</sup> *Professors*, SEMAPHORE PRESS, <https://www.semaphorepress.com/professors.html> (last visited May 20, 2015).

<sup>16</sup> See Loren, *supra* note 4, at 86-87 (reporting sales data).

<sup>17</sup> Semaphore Press evenly splits a title's net revenues with its author. Out of \$30 Semaphore Press receives, the author receives \$15.

This is quite typical for a traditional publisher of hard-copy titles.

Some indies sit at the opposite pole, broadly authorizing end-users to make copyright-law-relevant uses of the content. Professor Beebe's trademark law book, for example, is "made available under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License."<sup>18</sup> As the website for the book explains,

[i]n slightly simpler terms, this means that you are free to copy, redistribute, and modify the casebook in part or whole in any format provided that (1) you do so only for non-commercial purposes, (2) you comply with the attribution principles of the license (credit the author, link to the license, and indicate if you've made any changes), and (3) in the case of modified versions of the casebook, you distribute any modifications under the same license.<sup>19</sup>

Similarly, the Berkman Center's H2O casebook project uses a Creative Commons attribution-noncommercial-share-alike license,<sup>20</sup> as does the eLangdell series from CALI.<sup>21</sup>

Semaphore Press, by contrast, provides the user a more limited license: one can download the DRM-free PDF for one's personal use, download a replacement file if an earlier-downloaded copy is lost, and make a print copy of the PDF if desired.<sup>22</sup> While this is more generous than the traditional publisher's standard "All Rights Reserved" statement, it is *not* an "open source" license or Creative Commons license.

As with the *Print v. Electronic* dimension and the *Fee v. Free* dimension, we see a wide array of approaches to the *All Rights*

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<sup>18</sup> Bebe, *supra* note 6.

<sup>19</sup> *Id.*

<sup>20</sup> See *Welcome to H2O*, H2O, <https://h2o.law.harvard.edu> (last visited May 20, 2015) ("Share and Adapt Content. All the content on H2O is licensed for sharing and adaptation under a Creative Commons license (CC BY-NC-SA 3.0). You can clone content created by other H2O users, and they will be able to do the same with any materials you add.").

<sup>21</sup> CALI, *supra* note 10.

<sup>22</sup> *FAQs*, SEMAPHORE PRESS, <http://www.semaphorepress.com/FAQs.html> (last visited May 20, 2015).



*Reserved v. Broad User License* dimension. At the same time, these variations appear to cluster into shared patterns. We can summarize the patterns as three basic casebook types:

**Traditional** — Print, Required High Fee, All Rights Reserved

**Maverick** — Electronic, Low or Optional Fee, Some Rights Licensed

(*Examples*: Semaphore Press, Goldman & Tushnet)

**Open Access** — Electronic, Free, Creative Commons License

(*Examples*: eLangdell, H2O, Beebe, Boyle & Jenkins)

Additionally, for all the variations, there is one constant: to obtain a hardcopy book, some fee is required, although the prices charged do vary dramatically.

One final word about independently published casebooks, beyond the foregoing typology: It appears—to us, at any rate—that casebooks about intellectual property law and closely related topics are over-represented among the indies. Perhaps they would not be were one to take a complete census of the full population of indie e-casebooks and authors. If they *are* over-represented, even in a full census, perhaps that is so because intellectual property law professors are better positioned, by virtue of their training, both to manage the rigors of copyright law as it affects casebook inputs, and to navigate the full range of licensing choices for the casebooks they create. In any event, our typology, with its examples, is provisional. No one, so far as we know, curates a comprehensive census of indie e-casebooks, though law school librarians seem well positioned to do so. Such an on-going census would be quite helpful to the legal academy, if kept up to date.

## II. PEDAGOGY

The casebook is a teaching tool. In U.S. law schools, for more than a century, it has been *the* teaching tool of choice.<sup>23</sup> It

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<sup>23</sup> See Matthew Bodie, *The Future of the Casebook*, 57 J. LEGAL EDUC. 10,

dominates doctrinal courses, and doctrinal courses predominate in the law school curriculum. Independently published e-casebooks transform the way law professors and their students produce and consume casebooks, but do far less to change casebook content.

“Casebooks are of vital importance: they dictate the content of and approach to the course materials.”<sup>24</sup> Law professors, like professors generally, want to use the teaching materials that help them make their classes the best that they can be. One *could* build a set of course materials entirely from scratch. Most professors, however, do not; instead, they adopt one of the many casebooks that are usually available for a given course. In selecting from among available casebooks, with helpful advice from trusted colleagues (whether at one’s home institution or elsewhere), what a law professor looks for is this: the best book for the course at hand. The question returns the next time the course rolls around again: Is this *still* the best book for this class, given the way I plan to teach it?

Of course, law professors, like professors generally, can be a fussy bunch. Even the best casebook can fall short of one’s ideal, to a greater or lesser degree: “unless the professor has written the text her- or himself, no casebook completely maps what the professor wants to cover or the pedagogical approach the professor favors.”<sup>25</sup> Perhaps a favorite case isn’t included; or a key secondary source is excerpted, but infelicitously so; or the new blockbuster decision has just been handed down, months or years after the book’s contents were finalized, and so hasn’t been seamlessly presented. But these shortcomings typically prompt nothing more than small-scale responses, such as an individual professor’s preparation of an additional edited case or two for distribution to the class. After a few years into an edition’s run, the authors themselves may prepare a supplement for adopters, either for sale or for electronic distribution by PDF.

Traditional publishers appear to design a print casebook edition to last at least two or three years. As a result, print books may present more significant drawbacks of the sort just described. An

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11-13 (2007).

<sup>24</sup> *Id.* at 13.

<sup>25</sup> *Id.* at 14.

electronic casebook, depending on how one designs it, can sidestep some of conventional print's problems. Indeed, Professor Matthew Bodie detailed these advantages back in 2007:

The shift of legal materials from books to online databases has opened up the potential for a completely computerized version of the casebook. Instantly, a number of the problems with casebooks could be solved. Electronic materials can be quickly and easily edited. A case can be included as soon as it is published, a statute included as soon as it is passed. Moreover, individual professors could easily add to and subtract from the materials. Students could access these materials from wherever they have Internet access or a copy of the relevant data file; no more worrying about whether the book is at home or whether the photocopied materials have been lost.<sup>26</sup>

Perhaps, in light of these advantages, one would have expected the rapid arrival of a newly dominant form of electronic casebook. Professor Bodie, like many others, did: "Despite its privileged position, the casebook as we know it is probably on its way to extinction."<sup>27</sup> But those early reports of the print casebook's death were, it turns out, exaggerated.

It is *not* that the benefits of e-casebooks proved illusory; far from it. Looking at the actual offerings that became available after Professor Bodie's 2007 piece, independently published e-casebooks are superior to traditional publishers' print offerings (as well as their recent web-based offerings) along many dimensions. First, none are disabled with comprehensive, pervasive DRM that limits such activities as annotation, printing, creation of back-up copies, and the use of text-to-speech software to create audio files. These actions are plainly desirable to the end user, which means that DRM-encased e-books from traditional casebook publishers are, by contrast, delivered broken. Second, all are easier for authors to update in light of new developments. Third, all are dramatically

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<sup>26</sup> *Id.* at 16.

<sup>27</sup> *Id.* at 10.

less expensive for the students assigned to use them, with no loss in the quality of the content. Why do traditional textbooks survive—indeed, thrive?

Tastes differ, of course. The eBook price advantage may not be salient to professors because professors do not pay for such books; they receive their copies gratis. This creates a pricing disconnect that is endemic to textbook markets for college and graduate school: The person choosing doesn't pay, and the people paying don't choose.<sup>28</sup> Some of an e-casebook's other advantages may strike some professors as bugs, not features. For example, some professors may conclude that students will not learn as much or as well from reading materials in electronic, rather than paper, form, although the current studies show mixed results.<sup>29</sup> Or an adopter may view the more frequent updates in light of new developments as a nuisance, causing more disruption than the new material merits. These problems do not, however, strike at the heart of the indie e-casebook project. A professor who thinks print is better than an e-form can direct students to print the readings, or to buy the print-on-demand version. And just as a professor can do with a traditional book, an adopter can use the prior edition of electronic casebook if its content is better for that adopter's purposes.

Some, however, may see indie e-casebooks' very independence from the traditional publishers as a drawback. Traditional publishers provide a deeply familiar quality-control signal about

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<sup>28</sup> See Ethan Senack, *Fixing the Broken Textbook Market: How Students Respond to High Textbook Costs and Demand Alternatives*, U.S. PIRG EDUC. FUND & STUDENT PIRGS 6 (2014) ("The underlying cause for high prices comes from a fundamental market flaw in the publishing industry. In a typical market, there is a direct relationship between consumer and provider. The consumer exercises control over prices by choosing to purchase products that are a good value, and the competition forces producers to lower costs and meet demand. In the textbook industry, no such system of checks and balances exists. The professor chooses the book, but the student is forced to pay the price. Because of this, the student is, in essence, a captive market. Without the ability of the student to choose a more affordable option, publishers are able to drive prices higher without fear of repercussion[.]"), available at <http://www.uspirg.org/reports/usp/fixing-broken-textbook-market>.

<sup>29</sup> See Ferris Jabr, *The Reading Brain in the Digital Age: The Science of Paper versus Screens*, SCI. AM. (Apr. 11, 2013), available at <http://www.scientificamerican.com/article/reading-paper-screens>.

the titles they publish, both to potential adopters and to potential authors, as well as to potential adopters' and authors' colleagues. Indeed, we call the long-established casebook publishers "traditional" precisely because they have played this quality-control function for decades, building up a large reservoir of trust among law professors veteran and new (virtually all of whom also used the books—sometimes earlier editions of *the very same* books—in their formative years as law students). To explore the notion that the potential-adopter or potential-author professor views independence from traditional publishers as a cost, we must turn our attention to the economy where such costs are reckoned: the economy of prestige.

### III. PRESTIGE

Part of a casebook's value comes not from what fills it, but from what surrounds it. Part of that surrounding is the cover *and* what that cover announces—namely, the publisher's identity. The publisher's brand embodies cultural capital, a reputation among one's peers, upon which an adopter or would-be author can rely.

The "right" publisher, esteemed and trusted, can subtly cloak the book's content with credibility among scholars. Essayist Louis Menand, himself an English professor at Harvard,<sup>30</sup> made just this point in his review of James English's study of literary prizes<sup>31</sup>:

In an information, or "symbolic," economy . . . the goods themselves are physically worthless: they are mere print on a page or code on a disk. *What makes them valuable is the recognition that they are valuable.* This recognition is not automatic and intuitive; it has to be constructed. A work of art has to circulate through a sub-economy of exchange operated by a large and growing class of middlemen: publishers, curators, producers,

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<sup>30</sup> His faculty biography is available at <http://english.fas.harvard.edu/faculty/menand>.

<sup>31</sup> JAMES F. ENGLISH, *THE ECONOMY OF PRESTIGE: PRIZES, AWARDS, AND THE CIRCULATION OF CULTURAL VALUE* (2005).

publicists, philanthropists, foundation officers, critics, professors, and so on.<sup>32</sup>

Note that “publishers” top Menand’s list of credentialing middlemen.

Recognition that a work is trustworthy, because others treat it as trustworthy, is critical to scholarly publishing. Indeed, it helps define the very essence of what it means to have published: “When a scholarly document is effectively published within a scholarly community, it seems to satisfy three criteria: *publicity*, *access*, and *trustworthiness*.”<sup>33</sup> We can see these facets of scholarly publishing in the casebook context.

An independently published e-casebook may lack the robust credence signal that a traditional publisher provides. This is not to say that the indie e-book has *no* trust-signaling markers, for all have at least two, and some have three or four.<sup>34</sup> The two signals of trustworthiness that every casebook has, even if only in small measure, are (1) the reputation the author enjoys among law professors, especially those who teach the subject,<sup>35</sup> and (2) the reputation the author’s home institution enjoys among other law

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<sup>32</sup> Louis Menand, *All That Glitters: Literature’s Global Economy*, NEW YORKER, Dec. 26, 2005 & Jan. 2, 2006, at 136 (emphasis added), available at <http://www.newyorker.com/magazine/2005/12/26/all-that-glitters>.

<sup>33</sup> Rob Kling & Geoffrey McKim, *Scholarly Communication and the Continuum of Electronic Publishing*, 50 J. AM. SOC’Y INFO. SCI. 890, 897 (1999) (emphasis in original).

<sup>34</sup> *See id.* (“Peer review is a particular form of vetting that is distinctive of the academic communities. However, scholars use other signs to assess the value of a document as well, often in combination—such as the *reputation* of a journal or publishing house as indicators of reliability.... At the lower end of a scale of trustworthiness lie practices such as self-publishing, publishing in nonreviewed (or weakly reviewed) outlets (such as the working paper series of an academic department), or publishing in edited (but not refereed) journals. Even in nonreviewed or weakly reviewed venues, the reputation of the author (as perceived by the reader) may be a major factor in determining trustworthiness.”) (emphasis in original).

<sup>35</sup> *See id.* at 899 (“The trustworthiness of a self-posted Web document depends almost entirely upon the author’s reputation within a particular scholarly community. For example, a nonpeer-reviewed posting on a Web site by a high-status and well-respected scholar may well be trusted more than a peer-reviewed journal article by someone not well known in the community.”).

professors. An indie e-casebook that others have already used has a third trust marker, (3) the reputation the book itself enjoys among its adopters. Finally, if the independent publisher offers multiple titles (e.g., CALI's eLangdell project), each of those casebooks has a fourth, analytically distinct trust marker, (4) the reputation the publisher enjoys among law professors. These features signal that one can trust the book to some degree.

But anxieties may remain for both the potential adopter and the would-be casebook author. Choices reflect on the chooser, in casebooks as in life. It is no surprise, then, that "the perceived status differences between publication venues as viewed by academic search and screen committees, tenure and promotion committees, grant review panels, and departmental chairs and deans plays a major role in selection of publication venue by a scholar."<sup>36</sup> In this environment, the traditional publisher may simply be the safer choice.

For example, consider a junior professor who is selecting a casebook with which to teach a newly assigned course. Imagine that it is *not* a course the professor took in law school. As we noted earlier, the professor tries to identify the best materials for the course. A ready-made casebook is almost always the path taken. The choice of casebook will be driven, in part, by what the adopter can discern about the book's specific content. Not having taught the course before, or even taken the course before, the professor cannot be sure about the book's quality from content alone. This is where other trust markers, including the publisher's reputation, come to the fore. But it is not merely reputation with the adopter that matters, and adopters know this (even if they never fully articulate the point). The publisher's reputation among one's *colleagues* has an influence as well. For, if the course goes badly—and some do, especially on the first go-round—a professor may fear aggravating the matter by having picked a strange-seeming casebook. In the professor's bad dream, the associate dean (who is, in reality, caring and helpful) sneers, "Were you even *trying* to teach this course well? Why did you choose *this* book? I've *never heard* of this publisher . . . ." Indeed, a professor may fear that the

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<sup>36</sup> *Id.* at 896 n.6.

unfamiliarity of a little-known publisher could send the course sideways in the minds of anxious *students*. (“Why did Professor Miller choose this book from Schmedlap & Dingbat? None of my other classes use a book published by S&D, and none of my friends’ classes do either. Miller can’t even choose the right book. Miller *really* does *suck!*”) If two books offer comparable content, the book from the traditional publisher is plainly the less risky choice.

Consider, too, the professor who has a set of materials ready to publish as a casebook. Assuming more than one publisher is willing to publish it, how should the professor choose among them? Contract terms, including royalty rates, are undoubtedly important. But the publisher’s reputation as a trusted brand among one’s colleagues can be significant as well. Why not opt for the casebook publisher that one’s peers and one’s dean will recognize instantly? The prospective publisher’s reputation, and basic function as a third-party validator, may have meant more in the past, when casebook authorship was celebrated,<sup>37</sup> than it means today, when professors (especially at the pre-tenure stage) are actively discouraged from working on casebooks by the many law professors who do not view casebooks as a scholarly form.<sup>38</sup> But

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<sup>37</sup> See, e.g., Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1904 (“Prosser commanded the field of torts. As noted earlier, he authored many of the most-influential articles and the leading treatise and casebook. He also served as the reporter for the *Second Restatement of Torts*. As a functional matter, Prosser was as close to a law-maker in torts as a legislator or judge might have been.”).

<sup>38</sup> See, e.g., Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881, 887 (2009) (“[S]cholarship directed at the audience of law students and practitioners (and I regard casebooks and treatises as a form of scholarship) is no longer highly valued in the academy. If I were advising a young colleague who wanted to advance within or move to an elite institution, I would frankly say that there are many rewards to doing casebooks and treatises, but recognition within the academy of law professors is not among them. Time and again as I have heard appointments candidates discussed, no weight whatsoever has been given to casebooks or treatises in the evaluation. Writing for the audience of law students and practitioners just doesn’t count.”); Richard A. Posner, *Foreword: What Books on Law Should Be*, 112 MICH. L. REV. 859, 865 (2014) (“As law schools have multiplied and law school faculties have grown, the number of law professors has increased to a point at which the legal



publisher reputation has not vanished; it still exists and factors into at least some publication decisions.

A traditional publisher's trustworthiness is, of course, no guarantor of success. Some casebooks undoubtedly fail, never making it to a second edition due to lackluster performance. Equally, the *absence* of traditional publication is not a sign that the casebook is weak or unimportant. One of the most successful, influential casebooks of all time—Hart & Sacks' *The Legal Process*<sup>39</sup>—was not formally published<sup>40</sup> until after, one might say

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professoriat has become an autonomous profession, the members of which write for each other. They still churn out casebooks and treatises, but no longer can a legal academic build a national reputation exclusively on such works, as was once the case (think of Austin Scott's treatise on trust law or the Hart and Sacks legal-process text)."); Carol S. Steiker, *Promoting Criminal Justice Reform Through Legal Scholarship: Toward a Taxonomy*, 12 BERKELEY J. CRIM. L. 161, 164 (2007) ("The publication of scholarly articles, and to a lesser extent of scholarly books, is the central requirement for obtaining an entry-level academic appointment and for promotion to tenure. Casebooks, treatises, and work on law reform commissions simply do not count (or at least they do not count nearly as much as they used to) either for these quite concrete assessments or, more abstractly, for garnering scholarly standing in the wider scholarly community."); G. Edward Wright, *From the Second Restatements to the Present: The ALI's Recent History and Current Challenges*, 16 GREEN BAG 2d 305, 315 (2013) ("When I entered law school in the late 1960s the overwhelming number of scholars at elite law schools worked on doctrinally oriented scholarly articles, treatises, and casebooks. They were rewarded for those efforts: to author a leading casebook or treatise was to cement one's scholarly reputation and visibility . . . . Although legal scholars continue to write journal articles which feature doctrinal and policy analysis, many of those articles also contain applications of the work of other disciplines, some of which are unintelligible to persons lacking training in the discipline in question. At the same time, while treatises and casebooks continue to be produced, they are not given the degree of scholarly 'credit' they once were, and junior scholars at elite law schools are not encouraged to write them.").

<sup>39</sup> See SCOTT SHAPIRO, LEGALITY 6 (2011) ("The Legal Process School led by the lawyers [and Harvard Law School professors] Henry Hart and Albert Sacks was an extremely influential approach to the American legal system that analyzed the law through an organizational lens."); Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 666 (2013) (observing that Hart & Sacks' "compilations of materials on the legal process influenced generations of jurists and scholars").

<sup>40</sup> Forty years ago, in the midst of reviewing the then-latest edition of Professor Gerald Gunther's constitutional-law casebook, Professor J.D. Hyman

well after, law professors had stopped using it regularly.<sup>41</sup>

For all their advantages, indie e-casebooks lack the strong trust signal that traditional publishers provide. This deficit, moreover, is definitional. An independent e-casebook publisher that has become well-known enough to signal trust on a par with the decades-old Big Four won't be independent any more; it will have passed into the ranks of the traditionals.

#### IV. TRUSTY PLATFORMS

Production and distribution tools for e-casebooks have proved themselves already. And people will continue to develop new tools tailored to this use, as well as put tools built for other uses to work in the e-casebook market. But will independent, low-cost, DRM-free e-casebooks ever fully displace the traditional publishers' products, whether print or electronic? That is a possible future, but not, we think, a very likely one.

The traditional publishers' books will continue to radiate trustworthiness. The publisher's brand is, in a sense, a platform for sustaining and signaling that a book is reliable and trustworthy. The common hardcover casebook has been used successfully in many law school classrooms, over many decades. It is an authority, and that trusted authority dispels the adopter's doubt and anxiety. If one publishes a casebook, it is easy enough to take one's place in that network of trusted authorities. That lawyers in the Anglo-American tradition—including law professors—should take comfort in a trusted, traditional authority should surprise no one.<sup>42</sup>

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called *The Legal Process* “the most influential book not produced in movable type since Gutenberg.” J.D. Hyman, *Constitutional Jurisprudence and the Teaching of Constitutional Law*, 28 STAN. L. REV. 1271, 1286 n.70 (1976).

<sup>41</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, at li-iii, cxxv-cxxix, cxxxiv-cxxxvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (recounting their decision to produce, for the first time, a formally published version of the famed Hart & Sacks *Legal Process* materials).

<sup>42</sup> Common law lawyers have used authority to persuade decision-makers for as long as they have operated. “In comparison with other legal traditions, the common law is said to be obsessed with the citation of authorities. This

Indie e-casebook publishers that build a trusted brand may also play this trust-signaling function, given the passage of enough time. And specific indie titles will gain a following, based on author reputation and user experience. The traditional publishers' trust-signaling advantage is likely, however, to endure, giving them time to adapt, as needed, to the far more user-friendly quality challenge that the indies present. A century of reputation-building has its advantages.

### CONCLUSION

All caselaw is born free, and yet everywhere casebooks are bound in costly buckram-covered boards.<sup>43</sup> How did this come to pass? Will it change? Surely the economy of prestige has played a part in producing this state of affairs: Publishers, validating quality to at least some degree, allay anxious law professors at both the publishing stage ("All your colleagues will understand who you're publishing with . . . everyone knows Tradition Corp.") and the adopting stage ("All your colleagues will understand who you're adopting . . . everyone knows Tradition Corp."). New publishing models, disrupting the established signaling system to at least some degree, appeal to mavericks less attuned or attentive to the most traditional casebook mechanisms. The traditionals will try to adapt, and the indies will continue, as they already have, to push past settled norms. We do not yet know what the next stable equilibrium in casebook provision will be. But we do know that prestige and its discontents will animate the moves and countermoves that take us there.

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obsession is reasonable given the common law's reliance on the doctrine of stare decisis. Judges, lawyers, and academics use citations to precisely communicate the authority they are relying on." Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1, 36 (2009) (footnote omitted).

<sup>43</sup> "Man is born free, and everywhere he is in chains." JEAN-JACQUE ROUSSEAU, *ON THE SOCIAL CONTRACT* 17 (Donald A. Cress trans., Hackett Publishing Company 1987) (1762).